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Supreme Court, U.S.
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In The
Supreme Court of the United States

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips,

Petitioner,

versus

MONROE COUNTY, MISSISSIPPI; CHARLES FARMER, M.D., individually; JOHN BEARRY, M.D., individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is recovery for wrongful death authorized under 42 U.S.C. § 1983?

2. In considering an action for wrongful death under 42 U.S.C. § 1983, are courts required by 42 U.S.C. § 1988(a) to apply the common law principle that survivors in a wrongful death action may recover if the wrongful act deprived the deceased of a chance to survive?

3. In a wrongful death action under 42 U.S.C. § 1983, does the court apply state procedural rules regarding standing to sue or does it apply Federal Rule of Civil Procedure 17(a) requiring all actions to be brought by the "real party in interest"?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Sandra Phillips, Petitioner;
2. Jim Waide, Counsel for Petitioner;
3. Monroe County, Mississippi, Respondent;
4. Charles Farmer, M.D., Respondent;
5. John Bearry, M.D., Respondent;
6. L. Bradley Dillard, Counsel for Respondent Monroe County, Mississippi;
7. John L. Clay, Counsel for Respondents Charles Farmer and John Bearry; and
8. Leonard Vincent, Counsel for Respondents Charles Farmer and John Bearry.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment as a matter of law in favor of the Respondents is attached as Appendix A, App. 1. The District Court for the Northern District of Mississippi (Davidson, J.) entered judgment as a matter of law in favor of the Respondents as Appendix C, App. 24, with a separate written opinion. *See* Appendix B, App. 13.

The order of the United States Court of Appeals for the Fifth Circuit denying rehearing is attached as Appendix D, App. 25.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit by a Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act

or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988(a) provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

Petitioner Sandra Faye Phillips filed this 42 U.S.C. § 1983 action to recover for the wrongful death of her son, Jonathan Phillips. Her complaint alleges that the death of

Jonathan was caused by the willful indifference of the Respondents (Monroe County, Mississippi, Dr. Charles Farmer and Dr. John Bearry) toward her son's cancer by refusing to provide physician-ordered chemotherapy. Trial Transcript, Vol. I, pp. 1-5. Accordingly, she charged a violation of the Eighth Amendment right to be free from willful indifference to the pain of Jonathan Phillips. *Id.*

Stated in the light most favorable to Petitioner (non-movant), *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000), the facts developed at the trial follow.

On June 24, 1998, Jonathan Phillips was in the Monroe County, Mississippi Jail, serving a sentence for aggravated assault. On that date, Jonathan Phillips' physician, oncologist Dr. Julian Hill of Tupelo, Mississippi, wrote the Monroe County Sheriff's Department stating that "Jonathan has recurrent testes cancer and needs to receive salvage chemotherapy – preferably high-dose therapy. . . . " T.T. Vol. I, pp. 20-21. Dr. Hill scheduled the chemotherapy for June 24, 1998 in Tupelo, Mississippi. T.T. Vol. I, pp. 22-23.

Jonathan Phillips' aunt, Diane Hunt, is herself a Monroe County Deputy Sheriff. Hunt attempted to arrange transporting Jonathan for the scheduled chemotherapy to Tupelo, Mississippi. However, the Monroe County Sheriff's Department, through Chief Deputy Burks, informed Hunt that Jonathan could not be transported to Tupelo, Mississippi, for the chemotherapy because the Monroe County Sheriff's Department "didn't have the manpower," T.T. Vol. I, p. 23, and also refused to allow Diane Hunt herself to transport Jonathan to Tupelo, Mississippi, for the chemotherapy. *Id.* at 22-23.

Rather than transporting Jonathan to Tupelo, Mississippi, for the chemotherapy scheduled to begin on June 29, 1998, Monroe County, Mississippi, relieved itself of the expense of treating Jonathan by transferring him to the state correctional facility. Monroe County, Mississippi, made the decision despite its knowledge that Jonathan's physician had ordered chemotherapy to begin on June 29, 1998 in Tupelo, Mississippi. Monroe County, Mississippi, arranged to move Jonathan to the state correctional facility without any assurance that the state had available a facility capable of providing immediate chemotherapy for Jonathan. *See* T.T. Vol. III, pp. 399-405.

On June 29, 1998, the day Jonathan was scheduled to begin his chemotherapy treatment in Tupelo, Mississippi, he was instead transported to the State Department of Corrections facility in Rankin County, Mississippi. The State Department of Corrections had no means of providing immediate chemotherapy. The state would not have accepted Jonathan had its officials known of the need for immediate chemotherapy. T.T. Vol. I, pp. 93, 117-18.

Upon arrival at the state correctional facility, Jonathan learned that he could not receive the immediate chemotherapy and was "terrified." T.T. Vol. III, p. 429. Similarly, Petitioner Sandra Phillips, Jonathan's mother, "fell apart" when informed there was no immediate chemotherapy treatment available. *Id.*

Respondent Dr. Farmer, a staff physician at the Rankin County facility, learned of Jonathan's cancer from Jonathan himself when he conducted Jonathan's intake physical examination. T.T. Vol. III, p. 438. However, Dr. Farmer testified that he could not arrange for Jonathan to begin immediate treatment until July 14, 1998, since it

was necessary for Jonathan to be transferred to the University Medical Center in Jackson, Mississippi, before he could receive the treatment. T.T. Vol. III, p. 452. Dr. Farmer testified that he "did nothing needed to determine how advanced it [Jonathan's cancer] was or to stop the advance of it." T.T. Vol. III, p. 446. Since the correctional facility had no means to treat Jonathan, Dr. Farmer testified there was "nothing he could do." T.T. Vol. I, pp. 33-34.

Similarly, Respondent Dr. Bearry, medical director at the Rankin County, Mississippi correctional facility, testified that the state had no facilities available for immediate chemotherapy and blamed Monroe County, Mississippi, for transferring Jonathan to the state facility. Dr. Bearry testified that the appropriate place to treat such an emergency was locally, T.T. Vol. I, pp. 92-93, and that no chemotherapy was available at any state facility. T.T. Vol. I, pp. 87-88.

In the absence of chemotherapy, the cancer spread to Jonathan's brain, and he died on July 18, 1998, never having received the chemotherapy that was supposed to have begun on June 29, 1998. T.T. Vol. I, pp. 128-29.

The primary defense at trial was lack of a proof of causation. Respondents successfully argued there was no proof Jonathan would have survived even had the prescribed chemotherapy been administered. The defense was buttressed by Jonathan's Tupelo, Mississippi oncologist Dr. Julian Hill, who testified that he could not say that the chemotherapy would have saved Jonathan's life, but only that it would have given him about a thirty to forty percent chance for remission of the cancer. T.T. Vol. II, p. 221.

The district court entered judgment as a matter of law for the Respondents, simply stating that the proof was not sufficient for recovery under Fifth Circuit precedents. T.T. Vol. III, pp. 499-501.

On appeal, the United States Court of Appeals for the Fifth Circuit held that the proof failed because Petitioner had failed to prove causation. The Fifth Circuit held that Petitioner did not prove that beginning the chemotherapy, as prescribed by Dr. Hill on June 29, 1998, would have saved Jonathan's life. While the Fifth Circuit recognized that there is a common law doctrine permitting a plaintiff to recover where a defendant's action deprives him of a "loss of chance" of survival, it held that this common law "loss of chance" doctrine does not apply in 42 U.S.C. § 1983 actions. *Phillips v. Monroe County, Mississippi,* 311 F.3d 369, 375 (5th Cir. 2002), Appendix A, App. 10.

Furthermore, although Respondents did not raise the issue in their briefs, the Fifth Circuit decided that there could be no recovery by either Jonathan for his own suffering or by his mother for her suffering because the action was brought as a "wrongful death action" and not a "survival" action. According to the Fifth Circuit, for these items to be recovered, state law required Petitioner style her pleading as being for "survival" rather than one for wrongful death. 311 F.3d at 373 n. 1.

Believing that the Fifth Circuit's holdings contravene that of other circuits and that there are conflicting and confusing rules regarding wrongful death actions under 42 U.S.C. § 1983, Petitioner requests this Court to accept the case.

REASONS FOR GRANTING WRIT

I. THE WRIT SHOULD BE GRANTED SINCE THE FIFTH CIRCUIT'S REFUSAL TO APPLY THE COMMON LAW PRINCIPLE THAT DIMINISHING ONE'S CHANCES FOR SURVIVAL IS ACTIONABLE CONTRAVENES 42 U.S.C. § 1988(A) WHICH INCORPORATES COMMON LAW PRINCIPLES INTO 42 U.S.C. § 1983.

The United States Court of Appeals for the Fifth Circuit upheld judgment as a matter of law on the grounds that the common law principle allowing wrongful death recovery for a survival does not apply in actions under 42 U.S.C. § 1983. The court said:

> Second, Phillips suggests that she need only prove the defendants' actions increased the Decedent's risk of death due to the cancer. She seems to refer to the "loss of chance" doctrine often applied in medical malpractice contexts. The supporting cases she cites relate to medical malpractice suits and are not relevant here. *See Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, 327 (5th Cir. 1991) (declining to expand the "loss of chance" doctrine beyond its normal context of medical malpractice). In conclusion, we find that Phillips failed to prove that any acts or omissions on the part of the defendants caused the Decedent's death, and thus she has failed to prove the elements of her wrongful death claim.

311 F.3d at 375.

However, it is a clear common law principle that one is subjected to liability whenever his unlawful actions diminish the chances of the decedent's survival. *See*, generally, Annotation, *Medical Malpractice: "Loss of*

Chance Causality", 54 A.L.R. 4th 19 (1987). As explained in *Boburka v. Adcock,* 979 F.2d 424 (6th Cir. 1992), "[T]his theory allows a medical malpractice plaintiff to recover if he produces evidence that the defendant physician's malpractice reduced the patient's chances for a better outcome, even if the chance of the better outcome without the physician's negligence was less than fifty percent." 979 F.2d at 429. Courts "are united in their rejection of the requirement that there be testimony that the patient had an above-50-percent chance of a better result absent malpractice." John D. Hodson, Annotation, *Medical Malpractice: "Loss of Chance" Causality,* 54 A.L.R. 4th 19 (1987). For example, in *Herskovits v. Group Health Cooperative,* 99 Wash.2d 609, 664 P.2d 474 (Wash.1983), the Washington Supreme Court held that the reduction of a patient's chance for survival from thirty-nine percent to twenty-five percent due to a negligent failure to diagnose his cancer was sufficient proof of causation. *See also James v. United States,* 483 F.Supp. 581, 587 (N.D. Cal.1980) ("[n]o matter how small that chance may have been – and its magnitude cannot be ascertained – no one can say that the chance of prolonging one's life or decreasing suffering is valueless").

By refusing to apply the common law principle that the loss of a chance for survival is actionable, the Fifth Circuit has disregarded *Robertson v. Wegmann,* 436 U.S. 584 (1978). *Robertson* held that state law principles apply in 42 U.S.C. § 1983 actions where there is no applicable federal law unless state law contravenes 42 U.S.C. § 1983's purposes of providing compensation for violations of civil rights and of preventing abuses of power by the state. While *Robertson* dealt with state law regarding "survivorship" rather than state law regarding "wrongful

death," its clear direction is to apply state law in 42 U.S.C. § 1983 actions unless the state law is "inconsistent" with the purposes of 42 U.S.C. § 1983. 436 U.S. at 589-90. The Fifth Circuit had no authority to disregard *Robertson, supra*, nor to disregard *Burnett v. Grattan*, 468 U.S. 42, 58 (1984), which held that where federal laws do not provide an applicable rule, the courts must apply the state rule of decision except where it is shown to be "inconsistent with federal law."

Unlike the Fifth Circuit, other circuits have applied common law or state law to 42 U.S.C. § 1983 actions unless the state law is inconsistent with the purposes of 42 U.S.C. § 1983. *See*, for example, *Bass by Lewis v. Wallenstein*, 769 F.2d 1173, 1190 (7th Cir. 1985) (state law is incorporated into 42 U.S.C. § 1983 actions except in cases where it cannot be applied because it would strip plaintiffs of a remedy for violation of federal constitutional rights); *Jaco v. Bloechle*, 739 F.2d 239, 244-45 (6th Cir. 1984); (42 U.S.C. § 1988(a) brings state law into play in 42 U.S.C. § 1983 actions unless state law is "hostile" to the 42 U.S.C. § 1983 action; state law disallowing recovery for wrongful death where death was instantaneous was "hostile" to 42 U.S.C. § 1983); *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir. 1983) (state law survivorship rules apply in 42 U.S.C. § 1983 actions except where the state law is inconsistent with the purposes of 42 U.S.C. § 1983).

Thus, other circuits incorporate the laws of the states into 42 U.S.C. § 1983 actions absent evidence the state law is "inconsistent" with or "hostile" to 42 U.S.C. § 1983 actions.

Yet another approach is taken by the Eighth and Tenth Circuits. Those circuits do not apply state law

wrongful death law at all. Instead, they recognize a federal remedy under 42 U.S.C. § 1983 for wrongful death, with that federal remedy then *incorporating state damages rules*. In *Andrews v. Neer*, 253 F.3d 1052, 1063 (8th Cir. 2001), the court wrote:

> Andrews argues that surviving family members should be allowed to collect damages on their own behalf in a § 1983 claim for the wrongful death of another. We previously have declined to decide this question. . . . Andrews points out, correctly, that the circuit courts of appeal disagree regarding the availability of such damages under § 1983. In *Berry v. City of Muskogee*, 900 F.2d 1489, 1506 (10th Cir. 1990), the Tenth Circuit held that the court could not supplement the damages available to the plaintiff under the state survival statute with those available under the state wrongful death statute. The court reasoned that the wrongful death statute allowed collection of damages for items that the "decedent could not have recovered had he lived to sue for himself," such as loss of companionship and grief. *Id.* Thus, the court concluded that borrowing the damages available in the wrongful death statute would be "inconsistent with the predominance of the federal interest," and therefore would fail to satisfy the § 1988 criteria for borrowing state law. *Id.* The court concluded by outlining a federal remedy to be applied in § 1983 death cases that included compensatory damages such as medical and burial expenses, pain and suffering before death, loss of earnings based on the probable duration of the victim's life, the victim's loss of consortium, and other *damages recognized in such common-law tort* actions. *See id.* at 1506-07.

> The Fifth Circuit stands opposite the Tenth Circuit in its treatment of the damages available to a plaintiff in a § 1983 death case.
>
> . . .
>
> Our careful consideration of the competing arguments on this issue leads us to conclude that the approach of the Tenth Circuit, as set forth in *Berry*, represents the correct assessment of the damages available in § 1983 death cases.

253 F.3d at 1063 (emphasis added).

In short, the courts of appeals have three different approaches to 42 U.S.C. § 1983 actions for wrongful death. The Fifth Circuit Court of Appeals recognizes state law actions for wrongful death but refuses to recognize the common law principle that the loss of a chance to survive is actionable. The Second, Sixth and Seventh Circuits apply state rules of decision unless it is shown that the state rules are "hostile" to or "inconsistent" with federal law. The Eighth and Tenth Circuits do not incorporate state wrongful death statutes into 42 U.S.C. § 1983 at all but hold that there is a federal right to recover damages for wrongful death under 42 U.S.C. § 1983, and the damages for such action are measured by state law damages rules. This Court should accept this case to determine which approach is correct.

II. THE FIFTH CIRCUIT REFUSED TO FOLLOW PRECEDENTS OF THIS COURT BY DECIDING SANDRA PHILLIPS DID NOT HAVE "STANDING" TO SUE BASED UPON STATE PROCEDURAL RULES RATHER THAN FOLLOWING THE FEDERAL RULES OF CIVIL PROCEDURE.

Besides claiming damages for the wrongful death of Jonathan Phillips, Sandra Phillips (Jonathan's mother) sued for her own pain and suffering when she witnessed Jonathan being denied the chemotherapy treatment. According to the proof at trial, Sandra Phillips "fell apart" when learning that the state would not adhere to the doctor's orders to provide chemotherapy to her son. T.T. Vol. III, p. 429. The Fifth Circuit Court of Appeals declined recovery because of its interpretation of state procedures. It found that Phillips had brought the action as a "wrongful death" action rather than as a "survival action," and Sandra Phillips lacked "standing" to sue for Jonathan's suffering or her own under this type action. 311 F.3d at 373 n. 1.

In this holding, the Fifth Circuit runs afoul of fundamental rules. *Hanna v. Plumer*, 380 U.S. 460 (1965) held that if one of the Federal Rules of Civil Procedure addresses an issue, that rule, not any procedural rule of state law, must apply. According to *Hanna*: "[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." 380 U.S. at 471. Here, the Federal Rules of Civil Procedure provide that an action in federal court is to be brought by the

name of the real party in interest. Fed. R. Civ. P. 17(a). Since Sandra Phillips herself suffered fright and pain when her son was refused chemotherapy, she was the "real party in interest" and the appropriate party to bring the action. By refusing to follow Fed. R. Civ. P. 17(a) and, instead, deciding the issue by looking to hypertechnical state law distinctions between "survivorship" and wrongful death actions, the Fifth Circuit Court of Appeals has contravened *Hanna, supra*. Other circuits accept the principle that one may sue for violations of his own rights in federal court where the unconstitutional killing of another has injured him. *See League of Women Voters v. Nassau County Board of Supervisors*, 737 F.2d 155, 160 (2d Cir. 1984) or *O'Mally v. Brierley*, 477 F.2d 785, 790 (3d Cir. 1973). *See also Coggins v. Carpenter*, 468 F.Supp. 270, 282 (D.C. Pa. 1979) ("a person has standing to assert claims under 42 U.S.C. § 1983 if that person was aggrieved or injured by the conduct, even if that person was not the object of the conduct allegedly in violation of 42 U.S.C. § 1983").

Because the Fifth Circuit has looked to state procedural rules in determining the standing to bring this cause of action, rather than following the clear direction of Fed. R. Civ. P. 17(a), the writ should be granted.

CONCLUSION

The Fifth Circuit Court of Appeals in this case correctly noted the disagreement among the circuits on the important issues of recovery for wrongful death under 42 U.S.C. § 1983. The Fifth Circuit wrote:

> Wrongful death recovery under § 1983 has 'generated considerable confusion and disagreement.' . . . The Supreme Court has not yet addressed this issue, and, while the circuits are divided over whether such recovery is appropriate, we have consistently allowed it. . . .

Similarly, M. Schwartz and J. Kirklin, *Section 1983 Litigation Claims, Defenses and Fees*, § 11.3 (1986) observes:

> Whether one person may assert a § 1983 claim for damages resulting from the wrongful death of another is a subtle and complex question that has given the courts much difficulty and generated considerable confusion. The issue potentially calls into play principles of federal constitutional law, §§ 1983 and 1998, and state wrongful death statutes. The Supreme Court has yet to resolve it.

Respectfully submitted,

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SANDRA FAY PHILLIPS, on Behalf of the
Wrongful Death Beneficiaries of Jonathan Phillips,

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versus

MONROE COUNTY, MISSISSIPPI;
CHARLES FARMER, M.D., individually;
JOHN BEARRY, M.D., individually,

Respondents.

APPENDIX

APPENDIX A

311 F.3d 369

United States Court of Appeals,
Fifth Circuit.

Sandra Fay PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan PHILLIPS,
Plaintiff-Appellant,
v.
MONROE COUNTY, MISSISSIPPI; Charles Farmer, Dr., individually; John Bearry, individually,
Defendants-Appellees.

No. 01-60425.

Oct. 28, 2002.
Order Denying Rehearing Dec. 9, 2002.

Jim D. Waide, III (argued), Kristy Lynn Bennett, Waide & Associates, Tupelo, MS, for Plaintiff-Appellant.

John Samuel Hill, Lamar Bradley Dillard (argued), Mitchell, McNutt & Sams, Tupelo, MS, for Monroe County, MS.

John Lewis Clay (argued), Jackson, MS, Leonard Charlton Vincent, Mississippi Dept. of Corrections, Parchman, MS, for Farmer and Bearry.

Appeal from the United States District Court for the Northern District of Mississippi.

Before WIENER, EMILIO M. GARZA, and PARKER, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Sandra Fay Phillips, the plaintiff, appeals the district court's judgment as a matter of law in favor of Monroe

County, Mississippi, Dr. Charles Farmer, and Dr. John Bearry (collectively "the defendants"), in this wrongful death suit brought under 42 U.S.C. § 1983. Phillips's son, Jonathan Phillips (the Decedent), died from testicular cancer while serving a sentence for aggravated assault in the Mississippi prison system. Phillips claims the defendants wrongfully caused the Decedent's death in violation of the Eighth and Fourteenth Amendments to the United States Constitution by refusing to provide the Decedent with necessary medical care. Additionally, Phillips brought a state law negligence claim against Monroe County. Using the standard announced in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), we affirm, because the plaintiff failed to prove the necessary causal link between the Decedent's death and the acts or omissions of the defendants. Additionally, the state law claim against Monroe County is barred by § 11-49-9(1)(m) of the Mississippi Code.

Most of the relevant facts surrounding this case are undisputed. The Decedent was diagnosed with widespread testicular cancer, including disease in the lymph nodes, abdominal cavity and lungs, in September 1996. He underwent surgery and chemotherapy, and was pronounced in remission within six months. In 1997, the Decedent's cancer returned, he completed three more rounds of chemotherapy, and was again found to be in remission. Before he was diagnosed with cancer, the Decedent was involved in a fight, for which he was later arrested and charged with aggravated assault. He pled guilty and was sentenced to 20 years imprisonment, with 15 years suspended. The Decedent began serving his sentence on May 15, 1998, when he was taken into custody by the Monroe County Sheriff's Department (the "Sheriff's Department"). Soon thereafter, he began complaining

of chest pains, shortness of breath, headaches, and spitting up blood. Upon learning of his symptoms, the Decedent's family immediately contacted his oncologist, Dr. Julian Hill. Dr. Hill was located in Tupelo, Mississippi. Due to the distance between the jail and Dr. Hill's office, Dr. Hill instructed the Sheriff's Department to take the Decedent to a local physician for blood work. After reviewing the results of the blood tests, Dr. Hill insisted the Decedent be brought to him for further tests. The Sheriff's Department complied, and the Decedent had more extensive tests, including CT scans, on June 24th. Dr. Hill found that the Decedent's cancer had reappeared in his lungs and spread to his spleen, and Dr. Hill advised the Decedent's family and the Sheriff's Department that the Decedent needed to receive salvage chemotherapy immediately and that it should begin no later than June 29th.

For reasons that are disputed and not relevant to our analysis, the Sheriff's Department sought to have the Decedent transferred to the state prison system to receive his chemotherapy treatments. It first attempted to have the sentencing court modify the Decedent's sentence so that he could be under house arrest during his treatment, but the judge found he was without jurisdiction to do so. Monroe County's Chief Deputy next contacted Dr. John Bearry, the Medical Director at the Mississippi State Penitentiary at Parchman, to determine what steps should be taken to transfer the Decedent given his medical needs. Dr. Bearry's office advised the Sheriff's Department to immediately transfer the Decedent from the Monroe County jail to the Central Mississippi Correctional Facility in Rankin County. The Decedent was transferred on June 29, and Dr. Charles Farmer, a staff physician, gave the Decedent a standard intake physical exam and referred

the Decedent to the University Medical Center in Jackson for cancer treatment. The prisoner referral process is time-consuming, but Dr. Farmer managed to schedule an appointment for the Decedent for July 14.

On July 1, the Decedent suffered abdominal pain and began vomiting. He was sent to the emergency room at the University Medical Center, diagnosed with pneumonia, given antibiotics, and returned to the prison. Eight days later, the Decedent began having seizures and fell unconscious in his cell. He was immediately transported to the University Medical Center, where he was diagnosed with a brain tumor. The Decedent's treating physicians at the Center, including Dr. James Thigpen, concluded that the testicular cancer had metastasized to the Decedent's brain, and they prescribed immediate aggressive radiation therapy. The treating physicians felt that chemotherapy would not have been an effective therapy for the brain tumor. Despite the radiation treatments, the Decedent died on July 18, 1998, and his death certificate lists the cause of death as herniation of the brain due to cancer.

Phillips subsequently brought this action on behalf of the wrongful death beneficiaries of the Decedent, alleging that his death was due to Monroe County's refusal to provide necessary medical care and failure to have policies providing for medical treatment for those prisoners in need of medical care. The complaint was later amended to include Dr. Bearry and Dr. Farmer, individually, for gross negligence and willful indifference to the Decedent's rights, alleging that they were deliberately indifferent to the Decedent's medical needs because they failed to provide him with the immediate course of chemotherapy prescribed by Dr. Hill. After Phillips presented her case, the defendants moved for judgment as a matter of law. The

district court granted the motion on all grounds, finding that the defendants were not deliberately indifferent to the Decedent's medical needs, and thus did not violate his constitutional rights, and that the state law claim against Monroe County was barred because Mississippi had not waived its sovereign immunity in this circumstance.

We review a district court's ruling on a motion for judgment as a matter of law *de novo. Industrias Magromer Cueros y Pieles S.A. v. Louisiana Bayou Furs Inc.,* 293 F.3d 912, 918 (5th Cir.2002). Federal Rule of Civil Procedure 50(a) states that a court should render a judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." In *Reeves v. Sanderson Plumbing Products, Inc.,* the Supreme Court clarified the approach a court should use when granting a judgment as a matter of law. First, we must review the record "taken as a whole." 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (internal citation omitted). Second, in reviewing all of the evidence in the record, we must "draw all reasonable inferences in favor of the nonmoving party" and "not make credibility determinations or weigh the evidence." *Id.* In other words, we must give credence to the evidence supporting the nonmovant as well as any evidence supporting the moving party that is uncontradicted, unimpeached, and not attributable to interested witnesses. *Id.* at 151, 120 S.Ct. 2097.

Section 1983 provides a cause of action for persons who are subjected to the deprivation of any constitutional right by a person acting under the color of state or federal law. Although Phillips brings this suit in federal court under § 1983, she is not alleging that her constitutional

rights were violated. Likewise, she does not seek relief as the personal representative of the Decedent's estate.[1] In other words, Phillips is not suing to redress her own § 1983 claims or any constitutional claims the Decedent

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[1] We have carefully reviewed the record for any evidence that this suit was brought as a survival action because such actions, which are very similar to wrongful death suits, are also available under § 1983. *See Moor v. County of Alameda,* 411 U.S. 693, 702-03 n. 14, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) ("[P]ursuant to § 1988 state survivorship statutes which reverse the common-law rule may be used in the context of actions brought under § 1983."); *Brazier v. Cherry,* 293 F.2d 401, 406-07 (5th Cir.1961) (incorporating both a state's survival statute and its wrongful death statute to provide full remedies for § 1983 violations). We pause at this point to emphasize the importance of the distinction between survival and wrongful death causes of action. If Phillips had brought this suit as a survival action, the causation analysis would be different because that type of claim redresses any constitutional injuries suffered by the Decedent *before* his death.

The record is somewhat ambiguous in this regard. The captions of both the original and amended complaint conspicuously refer to the Phillips family as wrongful death beneficiaries; the facts alleged characterize the suit as a wrongful death claim; and the parties, as well as the court, repeatedly refer to the case as a wrongful death suit. On the other hand, the types of damages sought by Phillips suggest she might have meant to bring both wrongful death and survival actions. Importantly, however, Phillips never refers to herself or any of the plaintiffs as personal representatives of the Decedent's estate, nor does she clearly assert that she is in fact the Decedent's executor or administrator. Under Mississippi's general survivorship statute, only executors, administrators, and temporary administrators may bring a survival action.

Miss.Code Ann. § 91-7-233 (1994). Thus, without alleging the appropriate legal status, Phillips could not have brought a survival action. *See Berryhill v. Nichols,* 171 Miss. 769, 158 So. 470, 471 (1935) (holding that recovery for pain and suffering of deceased allegedly caused by the negligence of doctor can only be had in suit by personal representative and not by next of kin or heirs at law). Because Phillips could only have brought this suit as a wrongful death claim, we do not address the merits of a survival action.

might have had prior to his death. Instead, Phillips sues on behalf of the wrongful death beneficiaries of the Decedent. She seeks to recover for the injuries the Phillips family suffered as a result of the Decedent's death, which, in turn, was allegedly caused by the defendants' violation of the Decedent's constitutional rights.

Wrongful death recovery under § 1983 has "generated considerable confusion and disagreement." *Rhyne v. Henderson County,* 973 F.2d 386, 390 (5th Cir.1992) (quoting *Crumpton v. Gates,* 947 F.2d 1418, 1420 (9th Cir.1991)). The Supreme Court has not yet addressed this issue, and, while the circuits are divided over whether such recovery is appropriate, we have consistently allowed it. *See Rhyne,* 973 F.2d at 390-91 (summarizing the line of cases permitting such recovery); *Brazier,* 293 F.2d at 406-07.

Wrongful death statutes create new causes of action on behalf of the statutorily-designated persons in order to compensate them for the death of the decedent. *See, e.g., Thames v. Mississippi ex rel. Shoemaker,* 117 F.2d 949, 951 (5th Cir.1941) (holding that Mississippi's wrongful death statute creates an independent cause of action). Unlike a survival action, a wrongful death action cannot be maintained unless the defendant's conduct is the cause of the decedent's death. SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 4:67 (4th ed., 2001 update). Accordingly, a plaintiff seeking to recover on a wrongful death claim under § 1983 must prove both the alleged constitutional deprivation required by § 1983 and the causal link between the defendant's unconstitutional acts or omissions and the death of the victim, as required by the state's wrongful death statute.

We decline to address whether Phillips proved any constitutional violations on the part of the defendants because no reasonable jury could have found for Phillips on the wrongful death causation issue. Reviewing the entire record and drawing all reasonable inferences in favor of Phillips, we find the evidence is uncontradicted that, even if the defendants arranged for the Decedent to begin chemotherapy on June 29th, as recommended by Dr. Hill, such action would not have prevented the Decedent's death.

The Decedent's death certificate lists the cause of death as "brain herniation" due to the metastatic testicular cancer. At trial, the Decedent's aunt testified that the treating physician explained to the Phillips family that the Decedent's death was caused when the brain tumor swelled so much that it herniated his brain. Dr. Thigpen, a disinterested witness, testified that the Decedent's death was a direct result of the cancer's metastasis to the brain and that chemotherapy would not have influenced the brain tumor in any way. His uncontradicted testimony was that chemotherapy is not an effective treatment for brain tumors because the drugs do not pass into the brain. Phillips confirmed during her testimony that the doctors had advised the family that chemotherapy would be ineffective. Dr. Thigpen also testified that the cancer did not spread to the brain because of the delay in initiating chemotherapy. In his opinion, the cancer had spread to the brain about six months before the Decedent passed away.

It is also undisputed that Dr. Hill, the Decedent's treating physician, had only the Decedent's chest, abdomen, and pelvis scanned in late June. No CT scan was done of the Decedent's brain prior to the onset of his seizures on July 9. Dr. Hill further admitted at trial that,

even with the salvage chemotherapy he had prescribed, the Decedent could, at most, have hoped for a thirty to forty percent chance of some temporary remission of his cancer. Finally, on July 1, when the Decedent was admitted to the emergency room and diagnosed with pneumonia, the doctors at the Medical Center performed a thorough neurological exam, and the results were normal. Dr. Thigpen's undisputed testimony at trial was that no physician would have had any reason to order a brain scan or radiation therapy until appropriate symptoms appeared. The Decedent's seizure on July 9 is the only evidence in the record of such symptoms, and it was immediately after this event that the correctional facility transferred the Decedent to the University Medical Center for appropriate treatment. In sum, there is no evidence in the record of any possible medical treatment that Monroe County or the individual defendants could have provided to save the life of the Decedent.

Phillips argues in her brief that it is not necessary for her to prove chemotherapy would have saved the Decedent's life. First, she refers to the fright and anxiety both she and the Decedent suffered because of the delay in chemotherapy. In this regard, Phillips confuses the causation issue. In a survival action, damages for the Decedent's physical suffering and mental anxiety as a result of the alleged deprivation of medical care would have been appropriate. In a wrongful death context, however, no damages are available until the plaintiff has cleared the causation hurdle. *See Wilks v. Am. Tobacco Co.*, 680 So.2d 839, 842 (Miss.1996) (holding that plaintiff's failure to prove decedent's death was caused by the wrongful acts of the defendant precludes any recovery of wrongful death damages under Mississippi's wrongful death statute).

Second, Phillips suggests that she need only prove the defendants' actions increased the Decedent's risk of death due to the cancer. She seems to refer to the "loss of chance" doctrine often applied in medical malpractice contexts. The supporting cases she cites relate to medical malpractice suits and are not relevant here. *See Bach v. Trident Steamship Co., Inc.,* 920 F.2d 322, 327 (5th Cir.1991) (declining to expand the "loss of chance" doctrine beyond its normal context of medical malpractice). In conclusion, we find that Phillips failed to prove that any acts or omissions on the part of the defendants caused the Decedent's death, and thus she has failed to prove the elements of her wrongful death claim.

Phillips also appeals the district court's judgment as a matter of law for Monroe County on the state law negligence claim. Mississippi waives sovereign immunity for itself and its political subdivisions in § 11-46-5 of the Mississippi Code, but subjects this blanket waiver to numerous exceptions, including those listed in § 11-46-9. In pertinent part, § 11-46-9 provides:

> (l) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> (m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed.

Miss.Code Ann. § 11-46-9(1)(m) (Supp.2001). In *Sparks v. Kim,* 701 So.2d 1113, 1114 (Miss.1997), the Mississippi Supreme Court applied this exception to a wrongful death

claim. Thus, § 11-49-9(1)(m) bars Phillips's state law negligence claim against Monroe County.

Phillips asserts in her brief that this provision is unconstitutional on the grounds that it violates the Equal Protection clause of the Fourteenth Amendment by denying equal protection to prisoners. We find that Phillips waived the constitutionality issue by failing to present it in either her original or amended complaint, as well as by failing to include it in the pretrial order.[2] *See Elvis Presley Enters., Inc. v. Capece,* 141 F.3d 188, 206 (5th Cir.1998) (holding that claims or issues omitted from the pretrial order are waived, even if they appeared in the complaint); *Ysleta del Sur Pueblo v. State of Texas,* 36 F.3d 1325, 1332 (5th Cir.1994) (holding that it is inappropriate to reach constitutional issues when a case can be decided on other grounds).

For these reasons, we find that the district court properly found for the defendants on all claims and the judgment as a matter of law is AFFIRMED.

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[2] Nor does the constitutional challenge appear to have merit. Prisoners are not a suspect or quasi-suspect class, and the Mississippi Supreme Court has already identified a legitimate state interest for § 11-46-9(1)(m) that more than meets the burden of rationality review. *See Sparks,* 701 So.2d at 1116 (finding that the statute protects the state's ability to hire competent prison personnel).

ON PETITION FOR REHEARING

Before WIENER and EMILIO M. GARZA, Circuit Judges.*

IT IS ORDERED that the petition for rehearing is DENIED.

The petitioner suggests that the Court erred by ruling *sua sponte* that her wrongful death cause of action brought under 42 U.S.C. § 1983 could not stand because she failed to prove that the defendants caused the decedent's death. We note that the defendants did address the causation issue both at trial and in their briefs. *Carmon v. Lubrizol,* 17 F.3d 791, 794 (5th Cir.1994) (this Court liberally construes briefs in determining issues presented for review). Moreover, we may affirm the district court's decision on any grounds supported by the record. *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.,* 245 F.3d 507, 511 (5th Cir.2001). The petitioner also argues that our holding is flawed because it does not explain why she was not allowed to recover for her own pain and suffering. The petitioner is correct that one whose own constitutional rights have been violated by actions directed at another may maintain her own § 1983 action. The petitioner, however, failed to allege which, if any, of her own constitutional rights were violated. Nor, upon review, could we identify any violation of the petitioner's rights.

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* Judge Parker was a member of the original panel but retired from the court on November 1, 2002, and, therefore did not participate in the petition for rehearing. This order is being entered by a quorum of this court pursuant to 28 U.S.C. Section 46(d).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SANDRA FAYE PHILLIPS,
on behalf of the wrongful death
beneficiaries of Johnathan
Phillips — PLAINTIFF

vs. — No. 1:98-CV313-D-D

MONROE COUNTY,
MISSISSIPPI; DR. CHARLES
FARMER; and DR. JOHN
BEARRY — DEFENDANTS

BENCH OPINION

(Filed May 1, 2001)

Presently before the court is the Defendants' motion for judgment as a matter of law, pursuant to rule 50(a)(1) to the Federal Rules of Civil Procedure. Upon due consideration, the court finds that the motion should be granted.

A. Factual and Procedural Background

On April 23, 2001, this case came before the court for jury trial. At the conclusion of the Plaintiff's case, the Defendants moved for judgment as a matter of law, pursuant to Rule 50(a)(1) of the Federal Rules of Civil Procedure. After viewing all the evidence presented in the light most favorable to the Plaintiff, the court finds that there is no legally sufficient evidentiary basis for a reasonable jury to find for the Plaintiff on any of her claims. As such, the court shall grant the Defendants' motion.

In this action, the Plaintiff asserts two causes of action against the Defendant Monroe County, Mississippi, one cause of action against Dr. Farmer, and one cause of action against Dr. Bearry. Specifically, the Plaintiff claims, pursuant to 42 U.S.C. § 1983, that all three of the Defendants wrongfully caused the death of her son, state inmate Johnathan Phillips (the Decedent), in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Further, the Plaintiff brings a state law negligence claim against Monroe County, in connection with the same events.

The underlying facts concerning the course of the Decedent's medical treatment while he was incarcerated are largely undisputed. On May 12, 1998, the Decedent, a nineteen-year-old testicular cancer survivor, was sentenced to a term of five years in a Mississippi Department of Corrections facility following his entry of a guilty plea to a charge of aggravated assault. On May 15, 1998, the Decedent, a resident of Monroe County, reported to the Monroe County Jail to begin serving his state prison sentence. Shortly thereafter, he began complaining of chest pains, shortness of breath, headaches, and spitting up blood. Upon hearing of this, the Decedent's family contacted Tupelo oncologist Dr. Julian Hill, who advised the family members to contact someone at the Monroe County Sheriff's Department and notify them of the Decedent's need for immediate medical treatment. Pursuant to Dr. Hill's instructions, the Monroe County Sheriff's Department transported the Decedent to and from four medical appointments, two with Dr. Hill in Tupelo, and two with Dr. Woodie Herron in Aberdeen. After blood tests and a CAT scan revealed that the Decedent's cancer had reappeared, Dr. Hill advised that the Decedent needed to begin chemotherapy immediately.

Following an unsuccessful attempt to have the sentencing state Circuit Judge modify the Decedent's sentence so as to allow house arrest, Monroe County's Chief Deputy contacted Defendant Dr. Bearry, who was the Medical Director at the Mississippi State Penitentiary at Parchman, to determine what steps should be taken. Bearry's office advised that the Decedent, who was a state prisoner, should be immediately transferred from the Monroe County Jail to the Central Mississippi Correctional Facility in Rankin County. The Decedent was so transferred on June 29, 1998, and was given an intake physical exam at the Central Mississippi Correctional Facility on July 1, 1998, by Defendant Dr. Farmer, a staff physician, who referred the Decedent to the University Medical Center in Jackson for treatment. Ordinarily, the prisoner referral process is quite time-consuming, and it often takes as long as eight weeks for a prisoner to be seen at the Medical Center. At Dr. Farmer's insistence, however, the Medical Center gave the Decedent an appointment for July 14, 1998.

On the night of July 1, 1998, after his intake physical, the Decedent began suffering from abdominal pain and vomiting. As a result, he was sent to the emergency room at the University Medical Center where he was diagnosed with pneumonia, and given antibiotics. Thereafter, on July 9, 1998, the Decedent fell unconscious in his prison cell and was immediately transported from the Rankin County facility to the University Medical Center. At the Medical Center, he was diagnosed with a brain tumor, with the

Center's physicians[1] concluding that the Decedent's testicular cancer had metastasized in his brain. It was this tumor that posed the greatest and most immediate threat to the Decedent. Dr. Thigpen, and the Center's other physicians, concluded that immediate aggressive radiation therapy was necessary. Chemotherapy, according to Dr. Thigpen's testimony, would not have been an effective treatment for the Decedent's brain tumor. Accordingly, the Decedent received radiation therapy for his brain tumor. In spite of these efforts, the Decedent expired nine days later, on July 18, 1998, while at the Medical Center. The Decedent's Death Certificate specifies the cause of death as hemorrhage of the brain due to cancer.

B. Standard

Rule 50(a)(1) of the Federal Rules of Civil Procedure sets forth the standard for granting judgment as a matter of law:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be

[1] One of the Decedent's treating physicians was Dr. James Thigpen, who was allowed to testify out-of-turn during the trial of this cause. Although Dr. Thigpen was called out-of-turn and therefore testified during the Plaintiff's case-in-chief, his testimony was a part of the record before the court, and would have in any event been properly considered by the court at the conclusion of the trial.

> maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1).

In applying this standard, the court must consider all of the evidence in the light most favorable to the nonmovant, drawing all reasonable factual inferences in that party's favor, and leaving credibility determinations and the weighing of evidence to the jury. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 149-50, 120 S.Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000); *Boeing Co. v. Shipman,* 411 F.2d 365, 374-75 (5th Cir. 1969); *Russell v. McKinney Hosp. Venture,* 235 F.3d 219, 222 (5th Cir. 2000). The court should grant a motion for judgment as a matter of law only when "the facts and inferences point so strongly and overwhelmingly in favor of [the moving] party that the court believes that reasonable [jurors] could not arrive at a contrary verdict." *Boeing Co.,* 411 F.2d at 374.

C. Discussion

To determine whether entry of judgment as a matter of law against the Plaintiff is appropriate, the court must ascertain if sufficient evidence exists for a reasonable jury to find that the Defendants violated the Decedent's rights under the Eighth amendment to the United States Constitution, and whether Monroe County was negligent in its treatment of the Decedent.

1. The Plaintiff's § 1983 Claims

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor

cruel and unusual punishments inflicted." The United States Supreme Court has held that the Eighth Amendment's "cruel and unusual punishments" clause imposes a duty on prison officials to ensure that prisoners receive adequate food, clothing, shelter, and medical care. *Farmer v. Brennan,* 511 U.S. 825, 832, 114 S.Ct. 1970, 1976, 128 L. Ed. 2d 811 (1994).

Along this line, inadequate medical care by a prison official or doctor can result in a constitutional violation for purposes of a § 1983 claim when the official or doctor's conduct amounts to "deliberate indifference to [the prisoner's] serious medical needs, constituting the unnecessary and wanton infliction of pain proscribed by the eight Amendment." *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L. Ed. 2d 251 (1976); *Stewart v. Murphy,* 174 F.3d 530, 533-34 (5th Cir. 1999). The Supreme Court, in *Farmer,* defined the "deliberate indifference" standard, explaining that a prison official or doctor is not liable unless he "knows of and disregards an excessive risk to inmate health or safety." *Farmer,* 511 U.S. at 837; *Stewart,* 174 F.3d at 534. Further, although inadequate medical treatment may at a certain point rise to the level of deliberate indifference, medical malpractice or negligent care do not. *See Stewart,* 174 F.3d at 533 ("Deliberate indifference encompasses only the unnecessary and wanton infliction of pain repugnant to the conscience of mankind.").

The heart of the Plaintiff's § 1983 claims is that the Defendants' conduct toward the Decedent constituted deliberate indifference to his serious medical needs. Specifically, the Plaintiff asserts that the Defendants' failure to provide chemotherapy for the treatment of the Decedent's testicular cancer met this standard. The court

finds, however, that neither Monroe County nor Drs. Farmer or Bearry acted with deliberate indifference to the Decedent's medical needs.

As for Monroe County's treatment of the Decedent, it is undisputed that the Decedent received transportation to and from four medical appointments while he was incarcerated in the Monroe County Jail, including two visits to Dr. Hill's office in Tupelo; the Decedent also received all prescribed medication in a timely fashion while he was incarcerated in Monroe County. Further, once Monroe County was told by the Department of Corrections that the Decedent was to be immediately transferred to the Central Mississippi Correctional Facility, Monroe County's Chief Deputy contacted the state facility and attempted to ensure that state personnel knew of the Decedent's cancer, and that the Decedent would receive prompt emergency medical treatment. Thereafter, the Monroe County Deputy that transferred the Decedent to the state facility took the Decedent's medical records and hand-delivered them to officials at the state facility. And, despite the Plaintiff's assertion that Monroe County should not have agreed to transfer the Decedent to the Central Mississippi Correctional Facility, state inmates such as the Decedent do not have the right to be incarcerated in a county jail. Miss. Code Ann. § 47-5-110; *see Micolaou v. Mississippi,* 596 So. 2d 863, 864-65 (Miss. 1992) ("The Mississippi Department of Corrections is vested with . . . the discretion to decide which of its institutions or facilities is appropriate for an offender.").

Following the Decedent's transfer to the Central Mississippi Correctional Facility on June 29, 1998, Monroe County had no further control over the medical care he received. And, in connection with that treatment, one of

the Decedent's treating physicians, Dr. Thigpen, testified that chemotherapy during the months of June or July of 1998 would not have been an effective treatment for the Decedent's condition because the Decedent's testicular cancer had began metastasizing in his brain as early as January of 1998. And, as previously noted, chemotherapy is not an effective treatment once cancer enters the brain.

As such, the court finds that there is no legally sufficient evidentiary basis for a reasonable jury to find that Monroe County acted with deliberate indifference, as that term has been defined by the Supreme Court and the Fifth Circuit, to the Decedent's serious medical needs.

Dr. Bearry, the Medical Director at the Mississippi Sate Penitentiary at Parchman, was not one of the Decedent's treating physicians. In fact, he never had any contact whatsoever with the Decedent. It was his office, however, as a subdivision of the Department of Corrections, that instructed Monroe County to transfer the Decedent to the Central Mississippi Correctional Facility, which is the only state penal institution located near a medical center that provides chemotherapy. All state inmates that suffer from cancer and are in need of chemotherapy or similar treatment are housed at the Central Mississippi Correctional Facility due to its proximity to the University of Mississippi Medical Center.

The court finds that there is no evidence suggesting that Dr. Bearry knew of the Decedent's grave condition and responded with deliberate indifference. In fact, Dr. Bearrys' office instructed Monroe County to transfer the Decedent to the only state facility where the Decedent could receive treatment for his condition. As such, the

court finds that Dr. Bearry is entitled to judgment as a matter of law on the Plaintiff's claim against him.

Dr. Farmer, unlike Dr. Bearry, did actually see the Decedent, and gave him a physical upon his arrival at the Central Mississippi Correctional Facility on July 1, 1998. As a result of that physical, Dr. Farmer referred the Decedent to the University Medical Center for treatment; Dr. Farmer subsequently had no further contact with the Decedent, and had no further control over the medical care the Decedent received. The Medical Center gave the Decedent an appointment for July 14, 1998. As noted above, however, the Decedent was actually admitted to the Medical Center on July 9, 1998, where he remained until his death on July 18, 1998. During that time, Dr. Farmer had no control over the Decedent's medical care. Therefore, as is the case with Monroe County and Dr. Bearry, the court finds that there is no legally sufficient evidentiary basis for a reasonable jury to find that Dr. Farmer acted with deliberate indifference to the Decedent's serious medical needs.

2. The Plaintiff's State Law Negligence Claim

The State of Mississippi waives sovereign immunity for itself and its political subdivisions in section 11-46-5 of the Mississippi Code, which provides that:

> [T]he immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived . . .

Miss. Code Ann. § 11-46-5(1) (Supp. 2000). This waiver of sovereign immunity, however, is subject to numerous exceptions. Several of these exceptions are set forth in section 11-46-9 of the Mississippi Code, which provides, in pertinent part, that:

> (l) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> (m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed.

Miss. Code Ann. § 11-46-9 (l)(m) (Supp. 2000). Further, the Mississippi Supreme Court has held that this exception applies to wrongful death claims, as well as negligence claims. *Sparks v. Kim,* 701 So. 2d 1113, 1114 (Miss. 1997).

Here, it is undisputed that the Decedent was an inmate of a jail or penitentiary at the time of his death. As such, the Plaintiff's negligence claim against Monroe County is effectively barred by section 11-46-9(l)(m) of the Mississippi Code. Monroe County, therefore, is entitled to an entry of judgment as a matter of law on the Plaintiff's state law negligence claim.

D. Conclusion

In sum, the court finds that judgment as a matter of law should be granted in favor of the Defendants as to all of the Plaintiff's claims.

As to the Plaintiff's state law negligence claim against Monroe County, the court finds that section 11-46-9 (l)(m) of the Mississippi Code bars any such claims.

As to the Plaintiff's § 1983 claims, the court finds that there is no legally sufficient evidentiary basis for a reasonable jury to find that any of the Defendants acted with deliberate indifference to the Decedent's serious medical needs. There is no evidence that the Decedent was deliberately ignored or maltreated or that any of the Defendants committed willful wrongs or malicious acts. *See Stewart*, 174 F.3d at 532. As such, the court holds that the Defendants' motion for judgment as a matter of law pursuant to Rule 50(a)(1) of the Federal Rules of Civil Procedure should be granted.

A separate judgment and order in accordance with this opinion shall issue this day.

This the 9th day of May 2001.

/s/ Glen H. Davidson
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SANDRA FAYE PHILLIPS,
on behalf of the wrongful death
beneficiaries of Johnathan Phillips — PLAINTIFF

vs. — No. 1:98CV313-D-D

MONROE COUNTY,
MISSISSIPPI; DR. CHARLES
FARMER; and
DR. JOHN BEARRY — DEFENDANTS

JUDGMENT AND ORDER GRANTING MOTION FOR JUDGMENT AS A MATTER OF LAW

Pursuant to a bench opinion issued on April 26, 2001, and supplemented this day by written opinion, it is hereby ORDERED that

(1) the Defendants' motion for judgment as a matter of law, pursuant to Rule 50(a)(1) of the Federal Rules of Civil Procedure, is GRANTED; and

(2) JUDGMENT is entered in favor of the Defendants on all of the Plaintiff's claims.

SO ORDERED, this the 9th day of May 2001.

/s/ Glen H. Davidson
Chief Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 01-60425

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips,

Plaintiff-Appellant,

versus

MONROE COUNTY, MISSISSIPPI; CHARLES FARMER, DR, individually; JOHN BEARRY, individually,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi, Aberdeen

ON PETITION FOR REHEARING

(Filed Dec. 9, 2002)

Before WIENER and EMILIO M. GARZA, Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

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* Judge Parker was a member of the original panel but retired from the court on November 1, 2002, and, therefore did not participate in the petition for rehearing. This order is being entered by a quorum of this court pursuant to 78 U.S.C. Section 46(d).

The petitioner suggests that the Court erred by ruling *sua sponte* that her wrongful death cause of action brought under 42 U.S.C. § 1983 could not stand because she failed to prove that the defendants caused the decedent's death. We note that the defendants did address the causation issue both at trial and in their briefs. *Carmon v. Lubrizol*, 17 F.3d 791, 794 (5th Cir. 1994) (this Court liberally construes briefs in determining issues presented for review). Moreover, we may affirm the district court's decision on any grounds supported by the record. *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 246 F.3d 507, 511 (5th Cir. 2001). The petitioner also argues that our holding is flawed because it does not explain why she was not allowed to recover for her own pain and suffering. The petitioner is correct that one whose own constitutional rights have been violated by actions directed at another may maintain her own § 1983 action. The petitioner, however, failed to allege which, if any, of her own constitutional rights were violated. Nor, upon review, could we identify any violation of the petitioner's rights.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit
Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.